U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Issue date: 05Aug2002

Case Nos.: 2001-LHC-3057; 2002-LHC-1596

OWCP Nos.: 1-148296; 1-148766

In the Matter of:

JOHN DISANO
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

and

Director, Office of Workers' Compensation Programs
U.S. Department of Labor
Party-in-Interest

APPEARANCES:

Stephen C. Embry, Esq.
David N. Neusner, Esq.
For the Claimant

Edward W. Murphy, Esq
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on May 6, 2002 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not

requested herein. The following references will be used: TR for the official transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, JX for a Joint exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that he has suffered an injury to his hand and lungs in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an information conference on May 2, 2001.

7. The applicable average weekly wage is $715.30.

8. The Employer has paid certain medical benefits, for a total of $8,056.71, but no compensation benefits have been paid.

The unresolved issues in this proceeding are:

1. Whether Claimant's injuries to his hands and lungs constitute work-related injuries.

2. If so, whether any disability is causally related to those injuries.

3. If so, the nature and extent of such disability.

4. Claimant's entitlement to an award of medical benefits.

5. The Employer's entitlement to the limiting provisions of Section 8(f) of the Act.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 11	Attorney Embry's letter filing the	04/29/02
CX 12	April 11, 2002 Deposition Testimony of Stephen L. Matarese, M.D.	04/29/02
CX 13	Attorney Neusner's letter filing the	05/28/02
CX 14	May 15, 2002 Deposition Testimony of Paul Murgo	05/28/02
RX 22	Attorney Murphy's letter filing the	06/10/02
RX 23	May 9, 2002 Deposition Testimony of David J. Kanarek, M.D.	06/10/02
CX 15	Claimant's brief	07/15/02
RX 24	Attorney Murphy's letter filing the	07/15/02
RX 25	Employer's brief	
CX 16	Attorney Embry's Fee Petition	07/15/02
RX 26	Attorney Murphy's comments thereon	07/16/02
CX 17	Attorney Neusner's response thereto with attached AFFIDAVIT of Attorney Embry	07/22/02
CX 18	Attorney Neusner's letter filing his	07/26/02
CX 19	Supplemental Fee Petition	07/26/02
RX 27	Attorney Murphy's response	08/01/02

The record was closed on August 1, 2002 as no further document were filed.

Summary of the Evidence

John DiSano ("Claimant" herein), sixty-four (64) years of age, with an eighth grade education and an employment history of manual labor, began working in 1974 as a battery repairman at the Quonset Point Facility of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Narragansett River and the Atlantic Ocean where the Employer

fabricates hull components, cylinders and sections which are then transported by ocean-going barges to the Employer's Groton, Connecticut shipyard where the components, cylinders and sections are installed on submarines being constructed or repaired at that shipyard. In the performance of his assigned duties, Claimant daily used various pneumatic or vibratory tools to repair and maintain the motors, machines and other equipment at that facility. He daily did much walking throughout the facility, Claimant estimating that he walked 5-6 miles during his 8-hour shift. He also had to lift heavy ladders, as well as his tool bag, around the entire building. He also had to work in tight and confined areas, as well as pulling cables to provide electricity to various places throughout the facility. (TR 20-28)

Claimant daily worked around other trades such as the welders, grinders, back gougers, painters, pipe laggers and in the performance of his assigned duties he was exposed to and inhaled asbestos dust and fibers, as well as the fumes, smoke and dust generated by those other trades. While he did not directly apply asbestos as insulation, he did have to cut out and remove old asbestos covering in order to be able to run his cables through various locations, Claimant remarking that the drilling he had to do caused dust to fly around the work environment and that sometimes the dust was so thick that it was difficult to see from one end of the compartment to the other. He began to experience shortness of breath in 1993 or 1994 and he had difficulty climbing ladder and stairs to such an extent that he would stop and rest so that he could perform his assigned duties. His shortness of breath worsened and by the summer of 1999 Claimant was "beat" and he had difficulty performing his work, Claimant remarking that overhead work especially bothered him, that he was still walking 5-6 miles daily and was still using pneumatic and vibratory tools. (TR 28-34)

Claimant's other medical problems include a back injury and 1975 lumbar surgery by Dr. Madden and Dr. Harahan, an injury that has resulted in back pain ever since that time. He has had knee problems for a long time and has difficulty kneeling. Prolonged sitting and standing aggravate his low back pain. He also has a significant hearing loss and he wears bilateral hearing aids. He underwent bilateral carpal tunnel releases on July 25, 2000 (left hand) and August 15, 2000 (right hand) but he still continues to experience numbness and tingling of both hands. He finally had to stop working on September 30, 1999 because of the cumulative effect of his multiple medical problems. He still experiences shortness of breath upon exertion, especially walking up stairs or when he tries to cut his grass. He does this latter task in stages as he has to stop often and rest. He has looked for work at those places identified by the Employer but no one has yet offered him a job. (TR 34-43)

Dr. Stephen L. Matarese, a pulmonary specialist, treats

Claimant's lung problems and noteworthy is the July 12, 1993 Consultation Report wherein the doctor opines that "this patient has obstructive sleep apnea." (CX 2-26) Claimant's September 27, 1999 pulmonary function tests showed an "airways obstructive defect" and a "decrease in diffusing capacity." (CX 2-27) Moreover, as of December 28, 1999, Dr. Matarese reported as follows (CX 2-29):

DISCUSSION:

Pulmonary exercise testing reveals a maximum oxygen uptake of 1502 ml/min or 38% of predicted. This is markedly reduced for an individual of this age and sex. The patient stopped due to fatigue.

The resting heart rate is within normal limits. The heart rate response to exercise is high. There is an anaerobic threshold which is indicative of significant cardiovascular pathology. The maximum heart rate achieved is 132 bpm or 85% predicted.

Blood pressure is normal at rest but is mildly elevated during exercise. The ECG is normal at rest. The exercise ECG reveals no diagnostic abnormalities. Please see formal ECG report.

Resting spirometry reveals airflow obstruction. No post exercise spirometry was performed.

Ventilation is elevated at rest. There is a normal ventilatory response to abnormality of breathing pattern is noted.

Exercise was performed on room air.

At rest on room air the oxygen saturation is adequate. During exercise oxygen saturation is adequate.

CONCLUSION:

- Exercise performance is markedly reduced. The patient stopped due to fatigue.

- Reduced cardiac capacity for exercise as seen in diseases of the left or right heart leading to a low stroke volume. Further evaluation is suggested if clinically indicated.

This patient's 8 hour work capacity is 4 METs. Energy requirements are approximately 2.5-3 METs for office work, 3-4 METs for domestic or light factory work, 4-6 METs for out door or regular factory work, and above 6 METs for heavy work, according to Dr. Matarese.

Claimant's bilateral knee problems are radiographically reflected on his October 19, 1998 knee x-rays wherein Dr. M. Julie Armada reports "degenerative changes" in both knees. The lumbar

spine x-rays taken that day also show “degenerative changes” and “disc space narrowing at several levels.” (CX 2-8) Moreover, “Degenerative changes are noted in the spine at multiple levels” on June 17, 1999 (CX 2-7) and again on November 2, 2000. (CX 2-6)

As of June 22, 2000 Dr. Matarese reported as follows (CX 2-1):

S: Mr. DiSano still has some dyspnea with exertion and intermittent cough but he has not had any sharp chest pains. he has been sleeping fairly well at night. He still snores very loudly but when he awakens in the morning he feels refreshed. He does not feel excessively tired. He uses the Serevent 2 puffs twice a day.

He is presently on Workmen’s Compensation through National Employers and is now collecting Social Security Disability.

O: PB 134/82. Pulse 80. Weight 204 lbs. TM’s are clear. The posterior pharynx reveals some mild injection. There is some mucous draining from the posterior nasopharynx. The lungs on auscultation reveal very distant breath sounds with no active wheeze or rhonchi at this time. The heart reveals a regular rate and rhythm.

A:
1) Asbestosis.
2) Obstructive airways disease.
3) Possible obstructive sleep apnea. He had a previous Sleep Study back in 1993.

P: Continue Serevent 2 puffs q12h.
Patient will notify me if he is having excessive somnolence or not feeling refreshed in the morning when he awakens. At that time we will repeat the Sleep Study.

Follow-up in six months with full PFT’s, according to the doctor.

As of December 22, 2000 Dr. Matarese reported as follows (CX 2 at 2):

HPI: John reports today for his follow-up PFT’s. He has a long history of asbestosis, obstructive airways disease, possibly OSA and sinusitis. His primary care is Dr. Joseph Petteruti. He performed his PFT’s today satisfactorily. His last PFT’s were 9/27/99. At that time his FVC was 87% pre and 99% post. Today his pre FVC is 98% of predicted. Post treatment is 101. His FEV.5 was 73% pretreatment. Today he is at 85% pretreatment and 87% post-treatment with a normal paradoxical response. His diffusion capacity has now returned to normal and in September of 1999 there was a mild decrease in his diffusion capacity. All in all he has had an insignificant response to his bronchodilation, however, he has had an overall improvement using the Serevent 2 puffs and he

admits to causal use. Additionally, he is not out of the work environment that was contributory his pulmonary disease.

O: Appearance- Caucasian male in NAD. AP 84. RR 20. PB 132/80. He does request a flu vaccine today.

Lungs- distant lung sounds but essentially CTA.

Cardiac- RRR with negative MRG.

HEENT - PERRLA. EOM's intact. Sclera clear. Conjunctiva pink. Nares patent. Trachea midline. Carotids 2+. Negative CLA. TM's visualized and pearly. Pharynx pink.

A: 1) Asbestosis.
2) Obstructive airways disease.
3) Chronic sinus congestion.

P: He will continue his Serevent 2 puffs q12h.
He will continue his Flonase 2 sprays bilaterally b.i.d. for nasal congestion.
He will follow-up in six months with Dr. Matarese.
He did receive a flu vaccine today in his left deltoid. He has no known allergies to eggs.
Patient will call with questions or concerns.

As of March 2, 2000 Dr. Matarese reported as follows (CX 1):

"Mr. DiSano underwent a Cardiopulmonary Exercise Stress Test on 12/28/99 in order to accurately determine his work capacity. We were able to measure his maximum oxygen consumption at peak exercise. His VO2 max was 11.4 ml/kg/min or only 24% of predicted. Utilizing the **American Medical Association's Guides to the Evaluation of Permanent Impairment**, IV Edition, he now satisfies the criteria for a Class IV, 51-100% severe impairment of the whole person.

I have enclosed a summary of the exercise test results for your records.

If I can be of any further assistance with Mr. DiSano, I would be happy to do so."

Dr. Matarese reiterated his opinions at is April 11, 2002 deposition the transcript of which is in evidence as CX 12, and the Doctor's opinions will be further discussed below.

Claimant's bilateral hearing loss is summarized in the September 5, 1999 report of Mary Kay Uchmanowicz, M.S., CCC-A (CX 3):

“HISTORY

John DiSano, age 61, a Maintenance Tech 1, from General Dynamics, Electric Boat Division, Quonset Point Facility, was seen for a diagnostic audiological evaluation to assess hearing damage caused by work-related noise-exposure. Mr. DiSano’s chief complaint was “if there was background noise he couldn’t make out what people said to him and he has had constant ringing in his ears for the past 10 years.” The patient further reported he “had to turn the television and radio up loud in order to hear it, people told him he talked loud and he occasionally had problems hearing people on the phone especially women’s voices.”

Mr. DiSano was hired by Electric boat as an Electrician in 1974, (classification changed to Maintenance Tech 1), and remained in that position up to the present with no break in service. The patient reported working in noise levels above 85 dBA throughout his employment. When questioned about hearing protection, Mr. DiSano “he always wore hearing protection the fitted ones.”

The patient did not report any significant otological, familial, or medical history. The patient denied any noisy hobbies.

“EVALUATION

At the time of today’s evaluation, Mr. DiSano brought copies of his most recent hearing test performed at Quonset Point for comparison.

Otoscopic exam revealed clear canals bilaterally. Reliable Pure Tone and Bone Conduction test results revealed bilateral mild to profound sloping sensorineural hearing loss. Speech Reception Thresholds were in agreement with Pure Tone Averages. Speech Discrimination was good at the Most Comfortable Loudness Level.

Impedance was within normal limits and acoustic reflexes were absent bilaterally.

“IMPRESSION

Mr. DiSano presents with bilateral mild to profound sloping sensorineural hearing loss which is consistent with previous test results at Quonset Point. Type and configuration is consistent with noise related hearing loss. To a reasonable degree of audiological certainty; **Mr. DiSano’s binaural hearing loss is causally related to his twenty-five years of employment at Electric Boat, working in noise levels above the OSHA standard of 85 dBA without adequate hearing protection**. (Emphasis added)

Due to the type and severity of the hearing loss, Mr. DiSano is a candidate of binaural amplification.

Utilizing the 1994 **Guidelines to the Evaluation of Permanent**

Impairment, today's evaluation yields a 11.2% impairment in the right and a 9.4% impairment in the left ear. No valid pre-employment audiogram was available for comparison.

Permanent binaural impairment is calculated to be 9.7%.

Further audiological assessment is not recommended at this time due to the reliability and consistency of today's evaluation with previous test results," according to the audiologist.

Claimant's bilateral knee problems are summarized by the October 27, 1999 report of Richard S. Limbird, M.D., of University Orthopedics and who is Clinical Assistant Professor, Adult Reconstructive Surgery, Brown University School of Medicine, wherein the doctor concludes as follows (CX 4-1):

"To Whom It May Concern:

John DiSano's impairment is as follows:

Using the Fourth Edition AMA **Guidelines for Evaluation of Permanent Impairment**, his impairment is based on a loss of joint space and as he still has joint space in both of his knees, but has good motion to both of his knees. A two millimeter joint space in the patellofemoral joint equates to a 4% impairment of the lower extremities and 10% whole person. This is present in both knees. He also has a medial compartment involvement, which measured three millimeters and this is a 3% impairment of the lower extremity and 7% whole person.

"Using the combined values chart for all of his impairment, he currently as a 14% impairment in the lower extremities and 29% whole person. Again this is based primarily on his complaints of knee pain, and in view of the fact that he has no loss of function based on motion, but does demonstrate arthrosis. His chondrosis is specifically loss of joint space. Radiographically his impairment is based on these radiographic findings," according to the doctor.

Dr. Edward Akelman, Professor and Vice Chairman, Brown University School of Medicine, treats Claimant's bilateral carpal tunnel and the doctor's reports are in evidence as CX 6. Noteworthy is the October 22, 1999 report of the doctor (CX 6-2):

"Sirs:

I had the opportunity to examine and evaluate your insured John DiSano in my office today. Mr. DiSano is a self-described 62-year-old, right-hand dominant electrician who retired from Electric Boat on 9/30/99. The patient gives a several year history of aching pain bilaterally with cramping, and numbness and tingling in his median nerve distribution, worse with physical activity during the time he was an electrician and also with driving. Recently his

symptoms have become more frequent at night even though the severity of his symptoms have improved now that he is not working. He has not had any conservative treatment at this time, and is concerned about his inability to use his hands in light activities at home.

The patient notes that he would normally work an 8-hour workday with two 15-minute breaks as an electrician at Electric Boat. He had previously worked at the Quonset Point as a battery repairman maintaining batteries.

The patient has a family history of diabetes. He currently has no major medical or surgical history. He is not on any medications, and has no known drug allergies.

Examination today shows a white male in no acute distress. Examination of cervical spine, shoulders and elbows are within normal limits. Examination of his wrist shows Tinel's is negative in both wrists. His Phalen's test is positive on the right at 30 seconds and positive on the left at 10 seconds. There is no thenar atrophy noted. He has mild evidence of stenosing tenosynovitis.

It is my impression that the patient has bilateral carpal tunnel syndrome.

Plan: The patient will have splits made. I will arrange for NCV testing. Semmes-Weinstein Monofilament Test is also scheduled.

Based on the history that he has given me today in terms of the type of work he was doing at Electric boat, **it is my opinion based on a reasonable degree of medical certainty that his carpal tunnel syndrome bilaterally is work related**. (Emphasis added)

His prognosis is good. He will return to see me in three weeks."

As of November 15, 1999 Dr Akelman reported as follows (CX 6-4):

"Sirs:

Mr. DiSano returns to my office today. He notes that although he has been wearing his splints he continues to have aching pain and cramping in his hands. He describes numbness in his median nerve distribution and also discomfort and pain along the mid portion of his left palm. He notes that his left middle finger is somewhat worse than his other digits.

Examination today shows a white male in no acute distress. Examination shows full range of motion of the cervical spine, shoulders and elbows. Examination of his wrist shows Tinel's is negative bilaterally in the median nerve distribution. Phalen's test is positive in the right wrist today at 25 seconds, and his

left wrist at 10 seconds. He has evidence of a large flexor tendon nodule in his left middle finger. He has mild evidence in both hands of stenosing tenosynovitis.

The patient's diagnosis is bilateral carpal tunnel syndrome and left middle finger stenosing tenosynovitis.

The patient's NCV is consistent with bilateral carpal tunnel syndrome.

I believe surgery is currently indicated. Please consider this a request to perform open surgical releases. I would like to perform these some time in the near future and would appreciate a quick faxed response. **It is my opinion based on a reasonable degree of medical certainty, that the patient's bilateral carpal tunnel syndrome as well as stenosing tenosynovitis is work related**," according to the doctor. (Emphasis added)

As of July 21, 2000 Dr Akelman sent the following letter to Claimant's attorney (CX 6-1):

"**Your client, John DiSano, has been partially disabled from the time I initially saw him in October of 1999. His restrictions are that he must wear splints as needed at work, limit his work to that which is not continually repetitive and lift or grip nothing greater than 40 pounds with either hand or wrist**. (Emphasis added)

I hope this information is of help to you. Please write or call if I can be of any further assistance."

Those surgical procedures took place on July 25, 2000 and August 15, 2000 (CX 6-7) and, as of January 7, 2002, the doctor reported as follows (CX 6-10):

"Sirs:

Mr. DiSano returned to my office today. He notes that his symptoms are somewhat worse than when I saw him in January of last year. Although he initially had no symptoms of numbness whatsoever, he has bilateral hand numbness and aching and cramping. It is present with any gripping and lifting activity. He has occasional nocturnal symptoms and notes that although improved, his hand function and numbness is not normal.

Examination in my office today shows well-healed surgical scars. His Phalen's test is positive in the right wrist at 60 seconds, and positive in the left wrist at 55 seconds. There is no thenar atrophy. He has full digital motion.

The patient's diagnosis is bilateral carpal tunnel syndrome post carpal tunnel releases.

Plan: I believe the patient has some degree of impairment. I have scheduled nerve conduction velocity testing, as well as a hand therapy evaluation. Based on the results of these tests, we will determine a different impairment than he was given in January of 2001."

Finally, as of March 4, 2002, Dr. Akelman sent the following letter to the Employer's adjusting firm (CX 6-11):

"Sirs:

Mr. DiSano was last seen in my office on January 7, 2002. Because of nocturnal symptoms, as well as bilateral hand numbness and aching, he was examined on that date and felt to have bilateral carpal tunnel syndrome post carpal tunnel release. On January 24, 2002, he had nerve conduction velocity testing, which showed abnormal median nerve sensory and motor latencies consistent with bilateral carpal tunnel syndrome.

Because of his current level of symptoms, physical findings, and nerve conduction velocity testing, the patient's diagnosis is chronic bilateral carpal tunnel syndrome.

Plan: The patient was discharged, as I do not believe any further aggressive surgery is needed. Based on the **Guides to the Evaluation of Partial Permanent Impairment** as published by the American Medical Association, Fifth Edition revised, Mr. DiSano has a 15% partial permanent impairment of his left upper extremity, and a 20% partial permanent impairment of his right upper extremity. He is discharged from my care at this time."

Dr. S. Pearce Browning, III, a noted orthopedic and hand surgeon, examined Claimant on April 30, 2002 and the doctor issued the following report (CX 8):

"I saw Mr. John DiSano in the office on April 30, 2002.

Mr. DiSano worked at EB Quonset from 1974-1999. His title was Maintenance Electrician (Facility). This covered a great deal. He put in ceiling lights, he did motor repairs, and particularly the motors on machine tools, air conditioning equipment, and any other type of electrically-driven equipment. He might also be asked to shovel snow, or any other maintenance work when needed. In his work he used the air tools, including burring machines, angle grinder, 12,000s, whirlybirds and air etchers. He does not recall using 6,000s or needle guns. He worked both in the field and in the shop.

His complaints include numbness in the hands and tingling. His hands do get cold from time to time, and his wife confirmed that they do get cold. He was thought to have a carpal tunnel by Dr. Akelman, who operated on his hands, right on August 15, 2000, left

July 25, 2000. He says the hands were better after the surgery. The cramps were not as bad, and he could drive distances without the hands going numb. He does not have trouble feeling small objects.

He has had electrical studies done, both before his surgery and after his surgery, and I thank you for sending those through.

He has had problems with the knees. He stopped working in 1999, and the knees have been worse since 1999. The right knee tends to give out if he steps backwards. There's a lot of cracking and occasional snapping in it. Less so on the left.

He had an injury to the back, and as you note he had disc surgery in 1975, and the back has been fair since then. He has to be careful what he does, but he managed to return to work and stay at work through 1999. The back still hurts.

He had sciatica before surgery but has not had significant sciatica afterwards. He has residual numbness down the side of the left leg from the thigh all the way to the toes. On the back, he is able to bend over about 70^0 with no major sciatica. Knee reflexes are a little sluggish on the lft.

X-rays of the back taken at my office, laterals only, show some mild arthritic change at T11-12, 12-1 and 1-2 with a little calcification in the anterior ligaments. L2-3 shows complete collapse. L3-4 is all right. L4-5 has a small anterior spur, and L5-S1 is completely collapsed and has anterior ligamentous bridging, so that this disc space is essentially fused.

I would recommend 15% permanent partial impairment of the lumbar spine.

The knees on exam are not hot, red, swollen or tender. The medial and lateral collateral ligaments and cruciates are stable. In the left knee there is a snap in the lateral compartment. There is no snap in the right. There is a good deal of crepitus under the kneecap. Impression is chondromalacia of the patella and possible lateral meniscus. I have a report of x-rays of each knee. Both show degenerative changes and on the right a probably loose body. As far as an impairment rating, I have reviewed the letter from Richard S. Limbird of October 27, 1999 which assigned a 14% impairment of each of the lower extremities, and I think this is a reasonable figure that should be accepted by all parties...

Dr. Akelman assigned 20% impairment of the right upper extremity and 15% of the left upper extremity, and I think that as far as the neuromuscular part goes, this is appropriate. However, no allotment was made for the vascular side, and I would assign right 10% left 10%, based primarily on the very positive Allen's test and the history of intermittent cold hands confirmed by his wife. It

is not possible between now and May 6, 2002 to get a vascular test done; they are scheduling now at the end of June, first week or so of July, and if the Court wants it done, that's how long it will take.

This would raise the total to 30% permanent partial impairment for the right upper extremity and 25% permanent partial impairment for the left upper extremity.

I have dealt with the hands, knees and back. I have not dealt with the lungs and the asbestosis, and the loss of hearing, because these are out of my field. However, I note the very substantial impairment, almost 50% whole person, from the loss of lung function. He has enough lung function so he can walk up one flight of stairs without stopping, but he cannot make two flights. Therefore, he would not be able to function in a job where he had to climb more than one flight of stairs regularly. In addition, this would bother his knees a great deal. He is not able to undertake prolonged standing; the back will not put up with prolonged sitting. Because of the knees and the back, he is not able to undertake prolonged walking.

As far as the hands are concerned, he should not use any air-driving or vibrating tools, particularly after having had a carpal tunnel release. He should not attempt heavy repetitive grasp, in particular the wire-cutting pliers that electricians commonly use. He was fortunate that, due to his lungs and other things, that he did not return to his job, because if he had his hands would be much worse.

All in all, considering his hands, knees, back and lungs, I don't think he can work in the trades at Electric Boat. Certainly he should not attempt to repetitively climb up and down stairs, or work on his knees, or crawl, or work in tight, confined areas. (Emphasis added)

I hope that this will cover his work limitations. If you have a specific question about a specific job, I'll be glad to try to answer it.

I don't think his hands, his back and his knees are up to working in an electrical motor repair shop.

I have written Dr. Stephen Petteruti about an opacity in the right upper abdomen. I don't think this has anything to do with work.

I hope that this will cover the information you need. Should further information be required, please request it...

ADDENDUM: Concerning the knees, at this point I would not recommend any intervention, but at age 64 I regard Mr. DiSano as having a life expectancy of another 15-20 years, and he may go on

to require a total knee replacement bilaterally. I would recommend that you leave his medicals open so that if he needs this in the future it will be covered," according to the doctor.

Claimant has also been examined by Arthur C. DeGraff, Jr., M.D., a noted pulmonary expert, and the doctor issued the following report on April 2, 2002 (CX 10):

"At your request I saw John DiSano in my office in consultation on 3/26/02. Mr. Disano complains of shortness of breath on exercise. His work history is as follows. His first job was at age 16 sharpening knives at the Colonial Knife store. He used an abrasive wheel for this. At age 17 he joined the U.S. Air Force and was a jet engine mechanic for four years. In that work, while there were seals in the jet engines, there was no friable asbestos and he does not believe he had any asbestos exposure. In 1958 he left the Air Force and went to work at State Battery where he repaired batteries for one year. In 1959 he started work at Quonset Point Naval Air Station where he did battery repair for electric trucks for the next 13 years, or until 1974. He was laid off from that job and went to work for Electric Boat as an electrician in 9/74. He worked as a facility electrician and did not work on the submarines. He continued working as a facility electrician for the next 25 years. In that job he ran electric wires and electric conduits in the facility buildings where he encountered rooms the walls of which were covered with asbestos through which he would sometimes have to drill. He worked overhead above false ceilings where ducts were covered with friable asbestos, installing computer cables and running electric wires and conduits. Additionally, there were pipes covered by friable asbestos. Some of the buildings had walls made of asbestos transite sheets through which he also had to drill holes to run wire conduits. Apparently there was no attempt at asbestos abatement in the buildings in which Mr. DiSano worked until the 1990s. There were only about 10-15 facility electricians who would have had similar exposure.

Mr. DiSano smoked 1 ½ packs of cigarettes a day and has reduced his cigarette intake to about 10 cigarettes a day. He notes shortness of breath on exertion and describes cold sweats that develop even while walking on a level surface. He walks about one mile a day with his dog and then has to sit and rest for a time. He can climb about 12 stairs before having to stop because of being "winded." He does not experience chest wall constriction. Cold air is not a problem for him. Increased humidity causes increased shortness of breath. He has no significant cough except with exertion. He does not raise any sputum. He notes that his ankles swell at night. He had an echocardiogram 3-4 months ago which is said to have been normal. Cardiac exercise tolerance test is said to have been normal with no abnormality on EKG noted. He has had recurrent irregular heartbeat when given albuterol for pulmonary function testing or when taking Serevent or Foradil. Those drugs are beta 2 agonists and a side effect of this class of drug is to cause increased

potential for an irregular heartbeat.

In addition to the above, his past medical history is significant for back laminectomy 22 years ago. This has not caused him any problem since then...

PHYSICAL EXAMINATION: Height 6'5". Funduscopic examination was negative. The oropharynx was clear. There were no neck masses noted. Chest was symmetrical and moved well with respiration. Breath sounds were normal throughout both lung fields. Heart sounds were of normal quality, A2>P2, M1>M2. No murmurs were noted. Extremities were normal with no peripheral edema noted at the time of the examination.

Mr. DiSano arrived with a chest CT scan. There is a small right pleural plaque noted at cuts 250-280 mm. There is also a left posterior pleural plaque noted at cut 155mm. There are right and left pleural irregularities at 30mm.

I have notes and records from Dr. Steven Matarese. Pulmonary function study was performed on 9/27/99. Forced vital capacity was normal and one-second expiratory volume revealed minimal airway obstruction which is not sufficient to result in disability. Using the **AMA Guides to Evaluation of Permanent Impairment** for predicted values, predicted apparent diffusing capacity is 39.8 and measured diffusing capacity is 62% of its predicted value.

Dr. Matarese also did an exercise test. Maximal oxygen consumption measured is reported as 1.5 liters but that appears to be on the basis of one point. With increasing load, the oxygen consumption appears to have leveled off at about 1.3 liters according to the graphic report while CO_2 production continues to increase. I would consider the maximal oxygen consumption to be 1.3 instead of 1.5 liters. Maximal heart rate was recorded at 132 beats per minute. Since carbon dioxide production was continuing to increase at the end of the exercise, and since oxygen saturation was normal throughout the exercise, exercise does not appear to be limited by respiratory function but rather by cardiac function.

I note that a sleep study was performed. This demonstrated mild sleep apnea. No therapy for this is indicated at this time.

Dr. Matarese indicates that Mr. DiSano is severely impaired as a consequence of reduced exercise capacity. I stress that the reduced exercise capacity appears to be of cardiac rather than pulmonary origin.

Mr. Murphy requested an independent medical examination by Dr. Kanarek. Dr. Kanarek's findings are similar to mine. However, I disagree with his interpretation of the chest CT. I believe that pleural plaquing is clearly present and consistent with Mr. DiSano's history of asbestos exposure.

Based on pulmonary function studies performed by Dr. Matarese on 2/27/99 and using the predicted formulas from **AMA Guides to Evaluation of Permanent Impairment**, based on reduced diffusing capacity, Mr. DiSano is 23% impaired as of the whole person due to his lung disease. With past history of significant asbestos exposure confirmed by pleural plaques on chest x-ray, it is my opinion that more likely than not that Mr. DiSano's pulmonary disability is the result of past asbestos exposure."

As noted above, Dr. Matarese reiterated his opinions at his April 11, 2002 deposition, the transcript of which is in evidence as CX 12.

The Employer defends the lung claim herein on the basis of the February 25, 2002 report of David J. Kanarek, M.D., Associate Clinical Professor of Medicine at the Massachusetts General Hospital and Harvard Medical School, wherein the doctor states as follows (RX 14):

"At your request, I examined John DiSano's major complaint is shortness of breath on any mild exertion. This is progressive in degree and has been present for about 2-3 years. He can walk a couple of miles on the level at a normal pace but has difficulty with hills. He generally does not cough except with exertion. Occasionally, he wakes up with coughing and shortness of breath and takes a drink of water. On occasions, he has noted wheezing.

He currently smokes half a pack per day but previously smoked 1½ packs per day since his teens.

His current medications include Advil and Serevent.

His past medical history is significant for:

1. Some deafness.

2. Back surgery 30 years ago.

3. History of gastroesophageal reflux disease.

4. Some painful knees.

In the past, he has been noted to be allergic to ragweed, dust, and molds and had hyposensitization therapy for 2 years with no improvement. He has also been evaluated for obstructive sleep apnea. This was very mild in degree, but is showed a lot of arousals, perhaps related to snoring. In the past, he used Klonopin for this process...

On physical examination, he weighed 305 pounds and was 76 inches tall. His blood pressure was 140/78 mmHg and heart rate 80 per minute. No cyanosis, clubbing, or regional adenopathy was noted.

No murmur, gallop, or cardiomegaly was present. His lung fields were clear without any wheezing or crackles. The lungs expanded well and were resonant. There was no hepatoslenomegaly and no peripheral edema.

Chest x-rays from November 2000 and June 1999 did not show any lesions. A CT of his thorax from September 28, 1999, did not show any evidence of asbestosis. There were no parallel lines or increased septal lines nor was there any honeycombing. There was a thin line of posterior basal atelectasis related to his weight.

Pulmonary function studies showed a vital capacity of 5.8 liters at 103% of predicted and an FEV1 of 3.6 liters at 82% of predicted with an increase in the FEV1 to 3.9 liters at 87% of predicted and a change in the FEV1/FVC to 63%. Single breath diffusion capacity was 29 or 89% of predicted...

In terms of occupational exposure, Mr. DiSano described to me that he was an electrician working at Electric Boat at Quonset Point. In 1975, he worked in a fuel hydraulics building, #880, in which the walls were coated with 2-inch asbestos. He ran 2-inch pipes through the walls for 6 months at that time and then intermittently until about 1990. During that time, there was intermittently other asbestos contact such as pipes in the ceiling.

Mr. DiSano had an exposure to asbestos. However, there is no evidence of any effect of this asbestos judging by his physical examination, functional studies, and his chest CT. He does have asthma, documented by the bronchodilator response in pulmonary function studies, and also shown by other pulmonary function studies in the record. This is probably due to allergies as well as related to his consistent cigarette smoking. His weight is also part of the relationship to his exercise intolerance. There is no evidence of any interstitial disease, or any restriction contributing to his disability and related to his asbestos exposure."

Dr. Kanarek reiterated his opinions at his May 9, 2002 deposition, the transcript of which is in evidence as RX 23.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, Is make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers**

Association, Inc., 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions

existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Harford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a)

presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that Claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board, using the old and now rejected standard in the First Circuit, held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in

contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem**

Steel Corp., 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his mixed pulmonary/respiratory disease and his bilateral carpal tunnel syndrome resulted from his exposure to and inhalation of asbestos and other injurious pulmonary stimuli at the Employer's shipyard. The Employer has not introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos**

v. Avondale Shipyards, Inc., 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

With reference to Claimant's bilateral carpal tunnel syndrome, the Employer has presented no evidence to rebut Dr. Akelman's diagnosis of work-related carpal tunnel syndrome. To buttress the findings of Dr. Akelman, the Claimant has offered the opinions of Dr. Browning who diagnosed carpal tunnel syndrome and a vasospastic disorder of the hands due to chronic vibration exposure.

The Employer appeared to have accepted the compensability of the hand claim by paying for the Claimant's medical, hospital and surgical care. However the Employer refused to stipulate to the work-relatedness of the hand injuries and has refused to pay any benefits for partial or total disability. The uncontroverted evidence established that Mr. DiSano was totally disabled from a medical standpoint for a period of months, that he sustained significant permanent impairment of use of the hands, and has permanent work restrictions as a result of residual hand symptoms.

As noted above, Section 20(a) of the Longshore Act provides the resumption that a claim comes within its provisions. The Section 20 presumption applies to the issue of the work-relatedness of an injury. To establish a **prima facie** claim for compensation the claimant must only establish that he sustained physical injury and that conditions existed at work which could have caused the injury. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once

the **prima facie** case is established, the presumption establishing the work-relatedness of the injury is created under Section 20. To rebut the presumption the Employer must present substantial evidence to prove that the Claimant's condition was not caused or aggravated by his employment. **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986).

The Employer has not presented any evidence to rebut the presumption and affirmative proof establishing that Mr. DiSano sustained bilateral hand injuries due to occupational repetitive trauma. The Employer has also failed to present any evidence rebutting the medical evidence establishing that the Claimant's hand injuries contribute to his overall disability. It has therefore been proven that Mr. DiSano sustained work-related injuries to the hands resulting in disability, and I so find and conclude.

With regard to the lungs, the Claimant's credible testimony regarding his exposure to asbestos and other lung irritants and his lung symptoms is sufficient to invoke the 20(a) presumption. **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990). The opinions of Drs. Matarese and DeGraff buttress the Claimant's **prima facie** showing.

To counter the presumption, the Employer presented the testimony of Dr. Kanarek. The essence of Dr. Kanarek's testimony is that the Claimant has allergic asthma which may have been exacerbated but not caused by workplace exposure to dust, fumes and smoke. However, the doctor admitted that Claimant was exposed at work to pulmonary irritants like toluene diisocyanate which are known to cause asthma. (RX 23 at 37)

Dr. Kanarek denies that Claimant has asbestosis or pleural thickening but his opinion is contradicted by Dr. DeGraff and the treating physician, Dr. Matarese. Furthermore, in his opening statement Respondent's counsel argued that under the **Peitrunti** case the treating physician should "be given much more weight" than an examining physician. (TR 19) **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 1043, 31 BRBS 84 (CRT) (2nd Cir. 1997) Application of the **Pietrunti** case to the issue of the work-relatedness of the Claimant's lung condition is particularly appropriate in light of the fact that the treater's testimony is buttressed by the opinions of an expert examination, Dr. DeGraff.

Dr. Kanarek's opinions are equivocal on the issue of whether the Claimant's work place exposures contributed to his asthma and therefore are not sufficient to rebut the presumption. However even if the presumption is rebutted, application of the **Pietrunti** case and the greater weight of the evidence lead to the conclusion that Mr. DiSano did sustain work-related lung disease due to exposure to asbestos and other lung irritants at Electric Boat, and I so find and conclude.

Furthermore, Dr. Kanarek's opinion does not constitute, in my judgment, rebuttal evidence because the doctor admits that Claimant's respiratory condition, which he characterizes as asthma (occupational?) was exacerbated by Claimant's exposures at Quonset Point.

Accordingly, I find and conclude that Claimant's bilateral carpal tunnel syndrome and his mixed pulmonary disease do constitute work-related injuries, that the Employer had timely notice and that Claimant timely filed for benefits once a dispute arose between the parties.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work at the shipyard. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit probative and persuasive evidence as to the availability of suitable alternate employment, as further discussed below. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed**

Shipbuilding and Construction Company, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may

be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979).

On the basis of the totality of the record, I find and conclude that Claimant was temporarily and totally disabled by his bilateral hand problems and his lung disease from October 1, 1999, reached maximum medical improvement on December 27, 1999 and that he has been permanently and totally disabled from December 28, 1999, according to the well-reasoned opinions of Dr. Matarese, Dr. Akelman and Dr. Browning.

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v.**

Newport News Shipbuilding and Dry Dock Co., 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

Claimant submits that he is totally disabled by the cumulative effect of his multiple medical problems and in support thereof he has offered the February 27, 2002 Vocational Assessment/Employability Evaluation of Paul F. Murgo, M.Ed., Inc., wherein Mr. Murgo reports as follows (CX 7):

I. **OVERVIEW**: John DiSano is a pleasant 64 year old former Facility Electrician who was referred by his representative David N. Neusner, Esquire for the purposes of a Vocational Assessment and Employability Evaluation. I met with the client on 2/22/02 and over the space of 1 ½ hours conducted the requested evaluation in order to evaluate the client's employability. During our time together Mr. DiSano maintained appropriate eye contact, demonstrated average verbal skills and at all times shared information without any hesitation, reluctance or guarding.

The client is married, and lives with his spouse in a single family home in Exeter, Rhode Island.

The client is not employed, and is receiving Social Security Disability Insurance, (SSDI), in the amount of $1,260 monthly along with retirement benefits from his employer, (EB) of $880 per month.

II. MEDICAL STATUS: I had available for my review the below listed medical information which was made available to me by Attorney Neusner prior to completing this assignment. The opinions and conclusions that are contained in this report are based on the below listed medicals, combined with the client's report of reduced functional capacity and activities of daily living.

SOURCE	DATE
Edward Akelman, M.D.	10/22/99 - 1/7/02
Mary Kay Euchmanowicz	9/5/99
EB Audiology Report	10/20/99
Richard S. Limbird, M.D.	10/26 & 10/27/99
Joseph L. Petteruti, D.O.	3/33/97 - 6/17/99
Stephen L. Matarese, D.O.	7/12/93 - 12/22/00
P.R. Tipirneni, M.D.	5/12 & 6/2/93
Toll Gate Radiology	10/19/98 - 11/02/00
The Sleep Lab (KCMH)	8/3/93
Gate Pulmonary Lab	9/27/99, 12/28/99

Mr. DiSano had a laminectomy to repair an injury to his low back area, has had ongoing problems with his knees bilaterally, and is post carpal tunnel release of both upper extremities. In addition he has had respiratory difficulty for which medication has been prescribed. He also has a documented hearing loss and uses hearing aides bilaterally. At the time of our meeting, Mr. DiSano reported that he had a sinus infection and that as a result he was not able to wear the hearing aides until the infection had cleared.

Dr. Akelman's office notes and correspondence span the time period from 10/22/99 - 1/7/02. In a letter dated 9/25/00, based on the treatment rendered for bilateral carpal tunnel, Dr. Akelman felt that Mr. DiSano was able to return to modified light duty work activity. He further specified that his patient should do no work that would be considered highly repetitive and that he be allowed to wear splints during the work day. He continued to be under active treatment at that time and had an appointment for further follow up. The subsequent noted dated 11/6/00 confirmed his earlier statement relative to work capacity and noted that his patient was actively involved in a home therapy program. The most recent correspondence to the employer which was dated 1/7/02 documents symptoms of bilateral numbness, aching and cramping. Based on that examination, Dr. Akelman requested that further testing be done including a hand therapy evaluation and that he would <u>then establish a new impairment rating based on the increase in symptoms.</u>

Mr. DiSano was referred to an Audiologist, Ms. Euchmanowicz, and her report is dated 9/5/99. After examination, she concluded that he had a permanent binaural impairment that she calculated to be 9.7%. She also concluded that the hearing loss was causally related to Mr. DiSano's 25 years of employment at Electric Boat.

Dr. Limbird examined Mr. DiSano on 10/26/99 relative to complaints of bilateral knee pain. After examination, he concluded that Mr. DiSano had a 29% impairment of the whole person.

Mr. DiSano was referred to Dr. Matarese and his reports cover the time period from 7/12/93 - 12/22/00. Dr. Matarese ultimately concluded, based on a Stress Test, that Mr. DiSano had a Class IV impairment, 51-100% impairment of the whole person. Subsequent to that Stress Test, Mr. DiSano continued to treat with Dr. Matarese and received prescriptions for Serevent, Flonase and Zyrtec. The diagnoses after examination on 12/22/00 were Asbestosis, Obstructive Airway Disease, and Chronic Sinus Congestion.

Mr. DiSano reports that he is presently using Advil for pain relief and has discontinued all other medications. He noted that the Serevent was causing a change in the rate of his heart beat and was therefore terminated.

He is on a low calorie diet, has lost 20 pounds and is presently weighing 287 pounds. He has drastically reduced the amount of his cigarette smoking, and has now limited himself to 10 per day. Mr. DiSano has made numerous attempts to discontinue cigarettes in the past, and noted that the last time he quit smoking his weight increased to 335 pounds.

His activities of daily living are less than sedentary and intermittent, including feeding and walking his dogs, utilizing an exercise machine three times per week for 20 minutes per session, and spending time on a computer where he tracks and occasionally trades the General Dynamics Stock which makes up his retirement account. He is unable to type on the keyboard and as a result utilizes a program, “Point and Speak”, which allows him to verbally give commands to the computer as opposed to using the keyboard.

He is able to cut his own grass, but does so in stages, typically taking three days for a task that would otherwise take him a matter of hours. Mr. DiSano notes that he is able to perform some limited tasks around the house but does so by pacing himself in consideration of the shortness of breath, knee, back and hand symptoms.

The balance of his time is spent reading fishing magazines, newspapers and mystery novels.

III. EDUCATION: Mr. DiSano finished the eighth grade in the public school system and subsequently earned his High School Equivalency. He also attended Johnson Wales for a brief period of time and completed a one year program at New England Tech designed to enhance his skills as an electrician at Electric Boat.

IV. VOCATIONAL TESTING: I utilized the Wide Range Achievement Test, (WRAT-R3) along with the Wonderlic Personnel Test, (WPT-Form

A) to evaluate this gentleman's level of academic achievement and cognitive ability...

... When I compared his performance with the Adult Working Population, that placed him at approximately the 22nd percentile (22.46%) an indication that he is essentially at the bottom quarter of the Adult Working Population in terms of cognitive ability. When compared by Central Tendency, Education his performance was consistent with those individuals who had completed between 10 and 11 grades of formal education.

V. VOCATIONAL HISTORY: For the last 25 years Mr. DiSano has been employed by General Dynamics, Electric Boat Division as an Outside Electrician, (825.381-030), an occupation that is considered to be Skilled, (SVP 8) and Medium in terms of the level of strength required. With regard to physical demands, the occupation requires frequent levels of kneeling, crawling, reaching, handling, fingering, etc. Mr. DiSano trained at Electric Boat to acquire the skills in order for him to successfully perform this occupation.

In the distant past, Mr. DiSano was employed at the Quonset Point Naval Air Station as a Battery Repairman and also had been employed as a truck driver for an automotive service firm in Providence, Rhode Island.

Finally the client is an Honorably Discharged Veteran of the United States Air Force having served four years as a mechanic.

VI. EMPLOYABILITY: From a vocational perspective, employability is predicated on a variety of factors that include Age, Education, Cognitive Ability, Functional Capacity and Transferable Skills.

Age, in and of itself does not preclude an individual from the work force. The Federal Government has recognized however, that there are certain categories of age, when combined with a limited or less education, and a reduced functional capacity where it becomes increasingly difficult for an employee to re-enter the workforce.[1] The category 60 to age 64 is considered to be "Close to Retirement Age" where the ability to make a vocational adjustment in terms of tools, work processes, and work settings becomes increasingly difficult. In essence it is the adversity of age combined with the limited functional capacity, narrow work history and limited education which significantly reduce the employee's access to alternative occupation.

Mr. DiSano reports that he earned a GED, and subsequently trained as an electrician at New England Technical Institute. The vocational testing is a very accurate indicator of his formal level of education and cognitive ability. In comparison to the Adult

[1]20 C.F.R. 404.1563(C), (1992)

Working Population, he was at the 22nd percentile, entirely consistent with his performance on the Reading and Arithmetic subtest of the WRAT where he finished at the 25th and 18th percentiles respectively.

The term Functional Capacity relates directly to the employee's ability to meet the specific requirements of occupations both as they are performed in the work place as well as the manner in which they are defined in the federal publications. Dr. Akelman was quite specific at least in terms of his report of 1/17/02, where he noted increasing symptoms of numbness and the need for further diagnostic testing in order to modify a pre-existing limitation of modified light work with no repetitive activity. From a vocational perspective, I would not consider an occupational setting, where Mr. DiSano was required to utilize his upper extremities in a repetitive, consistent manner.

His ability to communicate effectively is impaired as noted by the report of the Audiologist who concluded with a hearing impairment of 9.7%.

There were several references to a degenerative process in the client's knees bilaterally, a finding that vocationally would likely preclude occupations that would require Mr. DiSano to stand and walk for 6 hours of an 8 hour work day.

From a pulmonary perspective there was a diagnosis of Chronic Obstructive Pulmonary Disease and Asbestosis along with a Grade IV impairment which would certainly preclude Mr. DiSano from a work setting where he would be exposed to fumes, odors and noxious substances.

Transferable Skills are those occupationally significant characteristics that are not reduced or eliminated as a result of an individual's disability. As noted earlier, Mr. DiSano's work history is almost exclusively with General Dynamics as an Outside Electrician, an occupation which is classified as Skilled, (SVP 8). Absent a concurrent level of physical ability to those skills are of no practical application to a lighter, less physically demanding setting.

In summary, when I consider the multiple impairments that have been imposed on this gentleman over the course of his work history, **I have no choice but to conclude to a reasonable degree of certainty in the field of vocational rehabilitation and evaluation that there are no occupations Mr. DiSano is capable of performing.** (Emphasis added)

Mr. Murgo reiterated his opinions at his May 13, 2002 deposition, the transcript of which is in evidence as CX 14, and his opinions withstood cross-examination by Employer's counsel.

On the other hand, the Employer submits that Claimant is not totally disabled and, in support thereof, has offered the February 28, 2002 repot of its vocational expert, Edmond J. Colandra, M.A., CCM, CDMS, wherein Mr. Calandra opines that Claimant has the residual work capacity to work (1) as a security guard for several security firms; (2) as a public safety office at the Rhode Island Mall; (3) as a cashier at several companies; (4) as a customer service representative at a Cranston company; (5) as a dispatcher for a Providence limousine company; (6) as a front desk clerk at a motel over fifty (50) miles from his residence; (7) as a customer service person; (8) as an electrician; and (9) as a quality control inspector. Mr. Calandra opines that most of these opening are full-time and the "salary range for these openings is $16,640.00 - $41,600.00" and that these "wages would have been the same in 9/99."

Mr. Calandra reiterated his opinions at his April 22, 2002 deposition, the transcript of which is in evidence as RX 21.

As noted above, disability under the Longshore Act is an economic concept based on a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968) A determination of disability must consider the claimant's age, education, work history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970)

The employee has the initial burden of proving total disability. To make a **prima facie** showing of total disability the claimant need not establish disability from all work but rather that he cannot return to the regular duties of his usual employment. **Elliot v. C & P Telephone Co.**, 16 BRBS 89 (1984) Even a minor physical impairment can establish total disability if it prevents the employee from returning to his former employment. **Supra**. at 92. Medical evidence establishing that the employee's return to his usual work would aggravate his condition is sufficient to support a finding of total disability. **Care v. Washington Metro Area Transit Authority**, 21 BRBS 248 (1988).

If the claimant makes a **prima facie** showing of incapacity for his former employment, the burden shifts to the employer to show suitable alternate employment. **Cophus v. Amoco Production Company**, 21 BRBS 261 (1988). The Employer's evidentiary burden may only be met by showing realistic job opportunities which the claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **American Stevedores v. Salzano**, 538 F.2d 933, 4 BRBS 195 (2nd Cir. 1976), **aff'g** 2 BRBS 178 (1975). To show job opportunities to be realistic, the employer must establish their precise nature, terms and availability. **Thompson v. Lockheed Shipbuilding and Construction Company**, 21 BRBS 94, 97 (1988). To establish the claimant's earning capacity the employer must also

present proof of the pay scale for alternate jobs. **Moore v. Newport Shipbuilding and Drydock Company**, 21 BRBS 94, 97 (1988). Jobs identified as appropriate and available by a vocational counselor do not constitute suitable alternate employment when there is doubt as to whether the employee could perform the jobs due to his education and physical restrictions. **Uglesich v. Stevedoring Services of America**, 24 BRBS 180 (1991).

While the Employer argues that Mr. DiSano was a voluntary retiree, the uncontradicted evidence establishes that he was disabled from his former employment due to the work-related injuries to his hands and lungs as well as pre-existing injuries to the knees, ears and back. The Employer's medical expert, Dr. Kanarek, conceded that Mr. DiSano was fit for only a sedentary level of work due to the lung condition alone even aside from any additional impairment due to the hands, back and knees. (RX 23 at 48) The Employer's vocational expert, Edmund Colandra, admits that Mr. DiSano has a "reduced work capacity from his prior occupations." Mr. Colandra found that the Claimant's past work was at a medium level of physical exertion and now finds him physically capable of only light work. (Colandra depo. [RX 21] Exhibit 2, pp. 3, 4 & 6)

The labor market survey prepared by Mr. Colandra on behalf of the Employer is grossly deficient in countless ways and utterly fails to satisfy the Employer's burden of proving suitable alternate employment. On cross-examination, Mr. Colandra admitted that he did not contact any of the prospective employers to see if they would hire a worker like Mr. DiSano. (RX 21 at 25, 59, 61, 64 and 79) He also made no effort to determine the amount the various jobs would have paid at the time of injury. Relying on the dubious assumption that wage rates did not change between 1999 and 2002, Mr. Colandra never even asked the prospective employers how much the jobs paid in 1999 (RX 21 at 26, 31, 34, 45, 56, 60, 66 and 74) Mr. Colandra made no independent inquiry to determine the physical requirements and characteristics of the jobs he chose for Mr. DiSano. In many instances he relied only on conversations with a receptionist to determine the characteristics of the jobs. (RX 2 at 27, 36, 41 and 57)

Mr. Colandra did not meet with Claimant, he failed to administer any vocational tests and failed to review all of the medical evidence of record, including the reports relating to Mr. DiSano's knee, back and hearing disorders. His assumptions regarding Mr. DiSano's skills, temperaments and aptitudes were based on a hypothetical personality profile and provided to be incorrect. (CX 14 at 22)

The failure to establish wage rates in effect at the time of injury by itself invalidates the Employer's labor market survey. It is not as though this information is difficult to acquire. A phone call or internet search would have provided the relevant wage

rates. (CX 14 at 10) Such an inquiry would have revealed that wages have generally increased since 1999 in Rhode Island and Connecticut. (CX 14 at 9)

With regard to the appropriateness of the various jobs identified by Mr. Colandra, the Claimant directs the court's attention to the cross-examination of Mr. Colandra and the direct testimony of Mr. Murgo. Mr. Murgo, who met with the Claimant, tested him and evaluated all of the medical evidence, concluded that Mr. DiSano is disabled from competitive employment. He rejects each of the jobs identified by Mr. Colandra as incompatible with the Claimant's physical restrictions, skills and aptitudes. On cross-examination, Mr. Colandra was unable to defend even a single one of his job choices as appropriate, and I so find and conclude.

In view of the foregoing, I find and conclude that the testimony and written report of Mr. Colandra failed to meet the Employer's evidentiary burden of showing suitable alternate employment. The Claimant is therefore entitled to an award of total disability benefits, and an appropriate **ORDER** will be entered herein.

As indicated above, the Employer has offered a Labor Market Survey (RX 18) in an attempt to show the availability of work for Claimant in the various job identified above. I cannot accept the results of that very superficial survey which apparently consisted of the counselor making a number of telephone calls to prospective employers. While the report refers to contacts with area employers, I simply cannot conclude, with any degree of certainty, which prospective employers, if any, were contacted by telephone and which job sites were personally visited to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that the Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (RX 18 and RX 21) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific nature of the duties of those jobs, and whether such work is within the doctor's physical restrictions. (RX 18) Thus, this Administrative Law Judge has absolutely no idea as to what are the duties of those jobs at the firms identified by Mr. Colandra, or whether Claimant can perform any of those jobs.

I am cognizant of the fact that the controlling law is somewhat different on the employer's burden in the territory of the First Circuit when faced with a claim for permanent total disability benefits. In **Air America, Inc. v. Director, OWCP**, 597 F.2d 773, 10 BRBS 490 (1st Cir. 1978), the United States Court of Appeals for the First Circuit held that it will not impose upon the employer the burden of proving the existence of actual available jobs when it is "obvious" that there are available jobs that someone of Claimant's age, education and experience could do. The Court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. In **Air America**, the Court held that the testimony of an educated pilot, who could no longer fly, that he received vague job offers, established that he was not permanently disabled. **Air America**, 597 F.2d at 778, 780, 108 BRBS at 511-512, 514. Likewise, a young intelligent man was held to be not unemployable in **Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981). As can readily be seen, Claimant lacks the education and transferrable skills of the highly educated pilot in **Air America**.

In view of the foregoing, I cannot accept the results of the Labor Market Survey because, without the required information about each job, I simply am unable to determine whether or not any of those jobs constitutes, as a matter of fact or law, **suitable** alternative employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and

rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to

obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, the Employer shall authorize and pay for such reasonable and necessary medical care and treatment relating (1) to this mixed obstructive/restrictive pulmonary asbestos-related disease and (2) to his bilateral carpal

tunnel syndrome, commencing on September 30, 1999, and all such expenses shall be subject to the provisions of Section 7 of the Act.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant’s entitlement to benefits herein.

Responsible Employer

The Employer as a self-insurer is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General**

Dynamics Corp., 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant worked for the Employer from 1974 through September 30, 1999, (2) that Claimant has experienced breathing problems and sleep apnea since at least May 12, 1993 (RX 1 - RX 7), (3) that Claimant's degenerative changes in his back and both knees were reported on his October 19, 1998 diagnostic tests (CX 2-8), (4) that Claimant has experienced bilateral knee problems for many years (**see, e.g.**, CX 5-1, the June 17, 1999 office note of Dr. Joseph L. Pettereiti, Claimant's family doctor), (5) that Claimant has experienced lumbar problems since his back injury and surgery in 1975, (6) that Claimant has experienced bilateral hand/arm symptoms for a number of years, (7) that he finally underwent bilateral surgical releases in the summer of 2000, (8) that he has sustained previous work-related industrial accidents prior to September 30, 1999, (9) while working at the Employer's shipyard and (10) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability and his September 30, 1999 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Matarese (CX 1, CX 2, CX 9), Mr. Murgo (CX 7, CX 14), Dr. De

Graff (CX 10), Dr. Browning (CX 8) and Dr. Kanarek. (RX 14-1, RX 21)

Claimant's condition, prior to his final injury on September 30, 1999, at which time he was forced to stop working because of the cumulative effect of his multiple medical problems, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

As noted by the doctors, Claimant's cigarette smoking history and his obesity also play a part in his cumulative disability.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed fee applications on July 15, 2002 (CX 16) and on July 26, 2002 (CX 19) concerning services rendered and costs incurred in representing Claimant between August 15, 2001 and July 18, 2002. Attorney David N. Neusner seeks a fee of $21,655.95 (including expenses) based on 73.25 hours of attorney time at $215.00 and $225.00 per hour and 9.50 hours of paralegal time at $45.00, $64.00, $65.00 and $70.00 per hour.

The Employer has objected to the requested attorney's fee as excessive in view of the benefits obtained and the itemized services. (RX 26) Attorney Neusner has filed a spirited response in defense of his fee petition. (CX 17) Employer's counsel also objects to the 1.25 hours of services rendered in connection with preparation of the fee petition. (RX 27)

In accordance with established practice, I will consider only those services rendered and costs incurred after May 2, 2001, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

The Employer's objections to certain itemized services are hereby rejected as I find and conclude that the challenged entries are fair, reasonable, appropriate and necessary. This Administrative Law Judge, rejecting the Employer's objections, accepts the explanation for the services offered by Claimant's attorney. I also accept the Affidavit (CX 17) of Attorney Embry that it took him six (6) hours to drive to and from Boston from his office to attend the deposition of Dr. Kanarek. As Mr. Murphy should know, as his office is in Downtown Boston, Boston is one of the worst cities in the United States in which to drive into, around or through; the roads into the city are filled with what seems to be perpetual gridlock and Dr. Kanarek's office is right in the middle of this gridlock. This congestion is made worse as a result of the "Big Dig" and as a native Bostonian, I can vouch for the legendary narrow streets, as well as the one-way streets that lead into one another.

One further word. This claim had an informal conference on May 2, 2001 and was properly prepared for trial. The record consists of numerous exhibits and several post-hearing depositions. The matter was vigorously defended by the Employer and was unduly delayed by such defense. In fact, the Employer would not even stipulate to the causality of Claimant's bilateral carpal tunnel

syndrome, even though its own medical expert, Dr. Akelman, found such causality.

I shall, however, delete from the fee petition the 1.25 hours spent in preparing the fee petition. In this regard, **see Sproull v. Stevedoring Services of America**, 28 BRBS 291 (1994) (**Decision on Reconsideration**)(**en banc**); **Shaller v. Cramp Shipbuilding & Dry Dock Co.**, 23 BRBS 140 (1989); **Berkstresser v. WMATA**, 16 BRBS 231 (1984); **Morris v. California Stevedore & Ballast Co.**, 10 BRBS 375, 383 (1979). **See also** 20 C.F.R. §725.366(b). **Contra Hensley v. Eckerhart**, 461 U.S. 424 (1988); **Anderson v. Director, OWCP**, 91 F.3d 1322 (9th Cir. 1996); **Clark v. City of Los Angeles**, 803 F.2d 987 (9th Cir. 1986); **In re Nucorp Energy, Inc.**, 764 F.2d 655 (9th Cir. 1985); **Rose Pass Mines, Inc. v. Howard**, 615 F.2d 1088 (5th Cir. 1980).

Accordingly, I find that the fee petitions, except as modified, shall be approved in its entirety. Moreover, Attorney Neusner is awarded 1.75 hours of legal services, at the hourly rate of $225.00, in the preparation of his response and Attorney Embry's AFFIDAVIT (Exhibit A to CX 17) in successful defense of his fee petition as the Board has specifically approved this award.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $21,349.70 (including expenses of $4,559.70) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from October 1, 1999 through December 27, 1999, based upon an average weekly wage of $715.30, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on December 28, 1999, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act,

based upon an average weekly wage of $715.30, such compensation to be computed in accordance with Section 8(a) of the Act.

3. After the cessation of payments by the Employer continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. The Employer shall receive credit for those medical benefits previously paid to the Claimant as a result of his September 30, 1999 injury.

5. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

6. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the second Order provision above, subject to the provisions of Section 7 of the Act.

7. The Employer shall pay to Claimant's attorney, David N. Neusner, the sum of $21,349.70 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between August 15, 2001 and July 22, 2001.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl